

EXEMPTION 7(C)

Prior to Reporters Committee, before an agency could give a "Glomarization" response, it was required to check the requested records, if any existed, for any official acknowledgment of the investigation (e.g., as a result of prosecution) or for any overriding public interest in disclosure that would render "Glomarization" inapplicable. However, in Reporters Committee, the Supreme Court eliminated the need to consider whether there has been a prior acknowledgment when it expressly "recognized the privacy interest inherent in the nondisclosure of certain information even when the information may have been at one time public."⁶⁷ Further, as the very fact of an arrest and conviction of a person, as reflected in his FBI "rap sheet," creates a cognizable privacy interest, any underlying investigative file, containing a far more detailed account of the subject's activities, gives rise to an even greater privacy interest.⁶⁸

At the litigation stage, the agency must demonstrate to the court, either through a Vaughn affidavit or an in camera submission, that its refusal to confirm or deny the existence of responsive records is appropriate.⁶⁹ Although this "refusal to confirm or deny" approach is now widely accepted in the case law,⁷⁰ several

⁶⁷ 489 U.S. at 767.

⁶⁸ See FOIA Update, Summer 1989, at 5 (under Reporters Comm., Exemption 7(C) "Glomarization" can be undertaken without review of any responsive records, in response to third-party requests for routine law enforcement records pertaining to living private citizens who have not given consent to disclosure); see also FOIA Update, Spring 1991, at 6 (warning agencies not to notify requesters of identities of other agencies to which record referrals are made, in any exceptional case in which doing so would reveal sensitive abstract fact about existence of records).

⁶⁹ See Ely v. FBI, 781 F.2d 1487, 1492 n.4 (11th Cir. 1986) ("the government must first offer evidence, either publicly or in camera to show that there is a legitimate claim"); McNamera, 1997 U.S. Dist. LEXIS 12059, at **34-36 (finding agencies' affidavits sufficient to support "Glomar" response); Nation Magazine, No. 94-00808, slip op. at 9-11 (D.D.C. Feb. 14, 1997) (ordering agency to file in camera declaration with court explaining whether it ever assigned informant code to named individual and results of any search performed using that code); Grove, 752 F. Supp. at 30 (agency required to conduct search to properly justify use of "Glomar" response in litigation).

⁷⁰ See, e.g., Reporters Comm., 489 U.S. at 757 (request for any "rap sheet" on individual defense contractor); Schwarz, 1995 U.S. App. LEXIS 3987, at *7 (request for file on "alleged husband"); Beck, 997 F.2d at 1493-94 (request for records concerning alleged wrongdoing by two named DEA agents); Dunkelberger, 906 F.2d at 780, 782 (request for information that could verify alleged misconduct by an undercover FBI agent); Freeman v. United States Dep't of Justice, No. 86-1073, slip op. at 2 (4th Cir. Dec. 29, 1986) (request for alleged FBI informant file of Teamsters president); Strassman v. United States Dep't of Justice, 792 F.2d 1267, 1268 (4th Cir. 1986) (request for records allegedly indicating whether governor of West Virginia threatened

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cases have illustrated the procedural difficulties involved in defending a "Glomar" response when the requester's "speculation" as to the contents of the records (if any exist) raises a qualifying public interest.⁷¹

The significantly lessened certainty of harm now required under Exemption 7(C) and the approval of "categorical" withholding of privacy-related law enforcement information in most instances should permit agencies to afford full protection to personal privacy interests in law enforcement files whenever it can reasonably be foreseen that those interests are threatened by a contemplated FOIA disclosure.⁷²

⁷⁰(...continued)

to invoke Fifth Amendment); Antonelli, 721 F.2d at 616-19 (prisoner seeking files on eight third parties); Early, No. 95-0254, slip. op. at 3 (D.D.C. Apr. 30, 1996) (request for complaints against or investigations of judge and three named federal employees); Triestman, 878 F. Supp. at 669 (prisoner seeking records of investigations of misconduct by named DEA agents); Durham, No. 91-2234, slip op. at 4-5 (D.D.C. Nov. 25, 1992) (prisoner seeking file on possible suspect in murder investigation); Ray, 778 F. Supp. at 1215 (request for any records reflecting results of INS investigation of alleged employee misconduct); Knight Publ'g Co. v. United States Dep't of Justice, No. 84-510, slip op. at 1-2 (W.D.N.C. Mar. 28, 1985) (newspaper seeking any DEA investigatory file on governor, lieutenant governor or attorney general of North Carolina); Ray v. United States Dep't of Justice, 558 F. Supp. 226, 228-29 (D.D.C. 1982) (convicted killer of Dr. Martin Luther King, Jr., seeking any file on his former attorney, Percy Foreman, or Congressman Louis Stokes), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (unpublished table decision); Blakey v. Department of Justice, 549 F. Supp. 362, 365-66 (D.D.C. 1982) (professor seeking any records relating to a minor figure in investigation of assassination of President Kennedy who was indexed under topics other than Kennedy assassination), aff'd in part & vacated in part, 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision).

⁷¹ See Shaw v. FBI, 604 F. Supp. 342, 344-45 (D.D.C. 1985) (requester seeking any investigatory files on individuals whom he believed participated in assassination of President Kennedy); Flynn v. United States Dep't of Justice, No. 83-2282, slip op. at 1-3 (D.D.C. Feb. 18, 1984) (allegation of documents reflecting judicial bias), summary judgment for agency granted (D.D.C. Apr. 6, 1984); see also Knight Publ'g, No. 84-510, slip op. at 2 (W.D.N.C. Mar. 28, 1985) (on motion to compel unsealing of in camera affidavit).

⁷² See Attorney General's 1986 Amendments Memorandum at 9-12; see also Stone, 727 F. Supp. at 665 (discussing breadth of Exemption 7(C) protection after 1986 FOIA amendments); accord Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update Summer/Fall 1993, at 4-5 (establishing "foreseeable harm" standard governing use of FOIA exemptions); see also FOIA Update, Spring 1994, at 3.

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It has long been recognized that Exemption 7(D) of the FOIA, which protects against disclosure of information pertaining to confidential sources, affords the most comprehensive protection of all of the FOIA's law enforcement exemptions. Moreover, the Freedom of Information Reform Act of 1986 significantly strengthened the protections of Exemption 7(D) in a number of respects.¹

As amended, Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source--including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis--and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."²

Although in some respects the 1986 FOIA amendments essentially codified what had been the prevailing judicial interpretation of the prior language of the exemption, in other areas the amendments represent a significant expansion of the exemption's shield for confidential sources. Both Congress and the courts have clearly manifested their appreciation that a "robust" Exemption 7(D)³ is important to ensure that "confidential sources are not lost through retaliation against the sources for past disclosure or because of the sources' fear of future disclosure."⁴

¹ See Irons v. FBI, 880 F.2d 1446, 1452 (1st Cir. 1989) (en banc) (stating that "[i]n 1986, Congress acted again [to] 'broaden the reach of this exemption and to ease considerably a Federal law enforcement agency's burden in invoking it'" (quoting Irons v. FBI, 811 F.2d 681, 687 (1st Cir. 1987))); Crooker v. Tax Div. of the United States Dep't of Justice, No. 94-30129, 1995 WL 783236, at *19 (D. Mass. Nov. 17, 1995) (magistrate's recommendation) (explaining that "[i]n 1986, Congress amended exemption (7)(D) to considerably ease an agency's burden in invoking it"), adopted (D. Mass. Dec. 15, 1995), aff'd, 94 F.3d 640 (1st Cir. 1996) (unpublished table decision); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 11 (D.D.C. 1991) (quoting Irons, 811 F.2d at 687), aff'd, 968 F.2d 92 (D.C. Cir. 1992) (unpublished table decision); Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 13-15 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

² 5 U.S.C. § 552(b)(7)(D) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

³ See Brant Constr. Co. v. EPA, 778 F.2d 1258, 1262 (7th Cir. 1985).

⁴ Id.; see, e.g., Ortiz v. HHS, 70 F.3d 729, 732 (2d Cir. 1995) (stating that "Exemption 7(D) is meant to . . . protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities"), cert. denied, 116 S. Ct. 1422 (1996); McDonnell v. United States, 4 F.3d 1227, 1258 (3d Cir. 1993) (finding that "goal of Exemption 7(D) [is] to protect
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By the same token, though, agencies should now undertake a "more particularized approach" to this broad exemption in order to ensure that its underlying harm rationale is truly applicable in each instance in which it is employed.⁵

As previously noted, the shift from the "would constitute" to the "could reasonably be expected to constitute" standard in the threshold of the exemption should "ease considerably" a federal law enforcement agency's burden in justifying withholding.⁶ Moreover, by specifically identifying particular categories of individuals and institutions to be included in the term "source," the FOIA Reform Act enacted into positive law the position reflected in the legislative history of the 1974 amendments to the FOIA: that the term "confidential source" was chosen by design to encompass a broader group than would have been included had the term "informer" been used.⁷

By its own terms, however, this statutory enumeration is not exhaustive. Historically, the term "source" has been interpreted to include a wide variety of individuals and institutions that are not necessarily specified on the face of the statute--such as crime victims,⁸ citizens providing unsolicited allegations of mis-

⁴(...continued)

the ability of law enforcement agencies to obtain the cooperation of persons having relevant information and who expect a degree of confidentiality in return for their cooperation"); Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 563 (1st Cir. 1992) (explaining that Exemption 7(D) intended to avert "drying-up" of sources); Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1486 (11th Cir. 1992) (observing that "fear of exposure would chill the public's willingness to cooperate with the FBI . . . [and] would deter future cooperation" (citing Irons, 880 F.2d at 1450-51)); Shaw v. FBI, 749 F.2d 58, 61 (D.C. Cir. 1984) (holding that purpose of Exemption 7(D) is "to prevent the FOIA from causing the 'drying up' of sources of information in criminal investigations").

⁵ See FOIA Update, Summer/Fall 1993, at 10 (setting forth higher standards for determining both confidentiality and disclosure harm under current policy and recent Supreme Court case law); see also FOIA Update, Fall 1994, at 7; FOIA Update, Spring 1994, at 3.

⁶ United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989); see also Providence Journal, 981 F.2d at 564 n.14 (stating that "1986 amendment eased the government's burden of proof substantially"); Attorney General's 1986 Amendments Memorandum at 9-13.

⁷ See S. Conf. Rep. No. 93-1200, at 13 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6291.

⁸ See, e.g., Coleman v. FBI, No. 89-2773, slip op. at 21 (D.D.C. Dec. 10, 1991), summary affirmance granted, 1992 WL 373976 (D.C. Cir. Dec. 4, 1992); Gula v. Meese, 699 F. Supp. 956, 960 (D.D.C. 1988).

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conduct,⁹ citizens responding to inquiries from law enforcement agencies,¹⁰ private employees responding to OSHA investigators about the circumstances of an industrial accident,¹¹ employees providing information about their employers,¹² prisoners,¹³ mental healthcare facilities,¹⁴ medical personnel,¹⁵ commercial or

⁹ See, e.g., Brant Constr., 778 F.2d at 1263; Pope v. United States, 599 F.2d 1383, 1386-87 (5th Cir. 1979); Almy v. Department of Justice, No. 90-0362, 1995 WL 476255, at **12-13 (N.D. Ind. Apr. 13, 1995), aff'd, 114 F.3d 1191 (7th Cir. 1997) (unpublished table decision); Mobil Oil Corp. v. FTC, No. 74-Civ-311, slip op. at 3 (S.D.N.Y. Dec. 7, 1978).

¹⁰ See, e.g., Providence Journal, 981 F.2d at 565; Miller v. Bell, 661 F.2d 623, 627-28 (7th Cir. 1981); Kowalczyk v. O'Brien, No. 94-1333, slip op. at 2 (D.D.C. Jan. 30, 1996); Steinberg v. United States Dep't of Justice, No. 93-2409, slip op. at 23 (D.D.C. Oct. 31, 1995); Kitchen v. DEA, No. 93-2035, slip op. at 14 (D.D.C. Oct. 11, 1995), appeal dismissed for failure to prosecute, No. 95-5380 (D.C. Cir. Dec. 11, 1996); Augarten v. DEA, No. 93-2192, 1995 WL 350797, at *2 (D.D.C. May 22, 1995); Anderson v. DEA, No. 92-0225, slip op. at 10 (W.D. Pa. May 18, 1994) (magistrate's recommendation), adopted (W.D. Pa. June 27, 1994), appeal dismissed, No. 94-3387 (3d Cir. Sept. 12, 1994); Almy, 1995 WL 476255, at **21, 23.

¹¹ See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 924-25 (11th Cir. 1984).

¹² See, e.g., United Techs. Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985); Government Accountability Project v. NRC, No. 86-3201, slip op. at 9-10 (D.D.C. June 30, 1993).

¹³ See, e.g., Johnson v. Federal Bureau of Prisons, No. 90-H-645, 1990 U.S. Dist. LEXIS 18358, at *9 (N.D. Ala. Nov. 1, 1990).

¹⁴ See, e.g., Sanders v. United States Dep't of Justice, No. 91-2263, 1992 WL 97785, at **4-5 (D. Kan. Apr. 21, 1992).

¹⁵ See, e.g., Putnam v. United States Dep't of Justice, 873 F. Supp. 705, 716 (D.D.C. 1995).

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financial institutions,¹⁶ state and local law enforcement agencies,¹⁷ and foreign law enforcement agencies.¹⁸ By contrast, neither fed

¹⁶ See, e.g., Williams v. FBI, 69 F.3d 1155, 1158 (D.C. Cir. 1995); Jones v. FBI, 41 F.3d 238, 248 (6th Cir. 1994); Kowalczyk, No. 94-1333, slip op. at 2 (D.D.C. Jan. 30, 1996); Biase v. Office of Thrift Supervision, No. 93-2521, slip op. at 11 (D.N.J. Dec. 10, 1993); Coleman, No. 89-2773, slip op. at 22 (D.D.C. Dec. 10, 1991); McCoy v. Moschella, No. 89-2155, 1991 WL 212208, at *1 (D.D.C. Sept. 30, 1991); Founding Church of Scientology v. Levi, 579 F. Supp. 1060, 1063 (D.D.C. 1982), aff'd, 721 F.2d 828 (D.C. Cir. 1983); Biberman v. FBI, 528 F. Supp. 1140, 1143 (S.D.N.Y. 1982); Dunaway v. Webster, 519 F. Supp. 1059, 1082 (N.D. Cal. 1981); cf. Hunsberger v. United States Dep't of Justice, No. 92-2587, slip op. at 6-7 (D.D.C. July 22, 1997) (finding confidential source protection for employee of financial institution).

¹⁷ See, e.g., Williams, 69 F.3d at 1160 (local law enforcement agency); Jones, 41 F.3d at 248 (law enforcement agencies); Bell v. FBI, No. 93-1485, 1993 U.S. App. LEXIS 27235, at *5 (6th Cir. Oct. 18, 1993) (local law enforcement agencies and their officers); Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 & n.27 (10th Cir. 1989) (stating that Exemption 7(D) "encourages cooperation and information sharing between local law enforcement agencies and the FBI"); Parton v. United States Dep't of Justice, 727 F.2d 774, 775-77 (8th Cir. 1984) (state prison officials interviewed in connection with civil rights investigation); Lesar v. United States Dep't of Justice, 636 F.2d 472, 489-91 (D.C. Cir. 1980); Beard v. Department of Justice, 917 F. Supp. 61, 63 (D.D.C. 1996) (local law enforcement agency); Kowalczyk, No. 94-1333, slip op. at 2 (D.D.C. Jan. 30, 1996); LeGrand v. FBI, No. 94-0300, slip op. at 12 (S.D.N.Y. July 10, 1995) (magistrate's recommendation) (state law enforcement agency), adopted (S.D. N.Y. Nov. 29, 1995); Linn v. United States Dep't of Justice, No. 92-1406, 1995 WL 417810, at **11, 32 (D.D.C. June 6, 1995) (state and local law enforcement agencies), appeal voluntarily dismissed, No. 97-5122 (D.C. Cir. July 14, 1997); Kuffel v. United States Bureau of Prisons, 882 F. Supp. 1116, 1125 (D.D.C. 1995) (nonfederal law enforcement agencies); Almy, 1995 WL 476255, at *13 (state and local law enforcement agencies); Putnam, 873 F. Supp. at 717 (state police); Cucci v. DEA, 871 F. Supp. 508, 513 (D.D.C. 1994) (same); Wickline, No. 92-1189, slip op. at 9 (D.D.C. Sept. 30, 1994) (nonfederal law enforcement officers and agencies); Anderson, No. 92-0225, slip op. at 11 (W.D. Pa. May 18, 1994) (other law enforcement authorities); Kennedy v. DEA, No. 92-2731, 1994 U.S. Dist. LEXIS 2275, at *15 (D.D.C. Feb. 28, 1994) (local police and sheriff's departments).

¹⁸ See, e.g., Shaw, 749 F.2d at 62 (foreign law enforcement agencies); Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1491-92 (D.C. Cir. 1984) (same); Founding Church of Scientology v. Regan, 670 F.2d 1158, 1161-62 (D.C. Cir. 1981) (foreign Interpol national bureaus) (1982); Keenan v. Department of Justice, No. 94-1909, slip op. at 16-17 (D.D.C. Mar. 24, 1997) (cooperating foreign law enforcement agencies); Schwarz v. United States Dep't of Justice, No. 95-2162, slip op. at 7-8 (D.D.C. May 31, 1996) (foreign Interpol
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eral law enforcement agencies nor federal employees when acting in their official capacities should receive any "confidential source" protection.¹⁹

As the Supreme Court recently made clear in United States Department of Justice v. Landano,²⁰ though, not all information received from sources in the course of criminal investigations is entitled to a "presumption" of confidentiality.²¹ Instead, the Court ruled that source confidentiality must be determined on a case-by-case basis,²² particularly noting that such a presumption should not be applied automatically to cooperating law enforcement agencies.²³ Accordingly, federal agencies now have the burden of determining and proving through the use of detailed affidavits in litigation that cooperating law enforcement agencies have provided information under either an express²⁴ or an implied promise of confidentiality.²⁵

The same underlying considerations that mandate that a broad spectrum of individuals and institutions be encompassed by the term "source" also require that

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national bureaus), summary affirmance granted, No. 96-5183 (D.C. Cir. Oct. 23, 1996), cert. denied, 117 S. Ct. 1704 (1997); Badalamenti v. Department of State, 899 F. Supp. 542, 549 (D. Kan. 1995) (foreign law enforcement officials); Linn, 1995 WL 417810, at **11, 22, 32 (foreign law enforcement agencies, including foreign Interpol bureaus).

¹⁹ See Retail Credit Co. v. FTC, 1976-1 Trade Cas. (CCH) ¶ 60,727, at 68,127 n.3 (D.D.C. 1976); see also FOIA Update, Spring 1984, at 7.

²⁰ 508 U.S. 165 (1993).

²¹ Id. at 175.

²² Id. at 179-80.

²³ Id. at 176; see FOIA Update, Summer/Fall 1993, at 10.

²⁴ See, e.g., Linn, 1995 WL 417810, at *32 (ruling that agency's conclusory attestation that "'policy of confidentiality . . . between [local and federal] law enforcement justifies nondisclosure' . . . [is] insufficient to justify withholding").

²⁵ See, e.g., Beard, 917 F. Supp. at 63 (finding implied confidentiality when agency attested that "[t]he FBI requested permission from the [local law enforcement agency] to release the information [and t]he request was denied"); Putnam, 873 F. Supp. at 717 (finding implied confidentiality when agency attests that "documents provided by [state police] are not accessible to the public absent authorization from the state law enforcement agency"); Cucci, 871 F. Supp. at 513 (finding implied confidentiality when agency attests that document stamped "not to be distributed outside your agency" and response by state police representative that state police "provide . . . law enforcement records to other agencies based upon an express understanding of confidentiality"); see also FOIA Update, Summer/Fall 1993, at 10 (advising agencies to pay particular attention under Landano to "institutional sources").

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the adjective "confidential" be entitled to a similarly broad construction: It merely signifies that the information was provided in confidence or in trust, with the assurance that it would not be disclosed to others.²⁶ Thus, "the question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential."²⁷ And because the applicability of this exemption hinges on the circumstances under which the information is provided, and not exclusively on the harm resulting from disclosure (in contrast to Exemptions 6 and 7(C)), no balancing test is applied under the case law of Exemption 7(D).²⁸

²⁶ See, e.g., Nadler, 955 F.2d at 1484; Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 575-76 (D.C. Cir. 1990); Irons, 880 F.2d at 1448; Shaw, 749 F.2d at 61; Radowich v. United States Attorney, Dist. of Md., 658 F.2d 957, 959 (4th Cir. 1981); Coleman, No. 89-2773, slip op. at 22 (D.D.C. Dec. 10, 1991); Borton, Inc. v. OSHA, 566 F. Supp. 1420, 1425 (E.D. La. 1983) (magistrate's recommendation published as "appendix").

²⁷ Landano, 508 U.S. at 172; see Ortiz, 70 F.3d at 733; McDonnell, 4 F.3d at 1258 (holding that "content based test [is] not appropriate in evaluating a document for Exemption 7(D) status[;] rather the proper focus of the inquiry is on the source of the information"); Providence Journal, 981 F.2d at 563 (explaining that "confidentiality depends not on [document's] contents but on the terms and circumstances under which" agency acquired information); Ferguson, 957 F.2d at 1069 (maintaining that key to withholding under Exemption 7(D) is document content and not circumstances under which information obtained); Weisberg, 745 F.2d at 1492 (stating that availability of Exemption 7(D) depends not upon factual contents of document sought, but upon whether source was confidential); Shaw, 749 F.2d at 61 (same); Lesar, 636 F.2d at 492 (noting that applicability of Exemption 7(D) does not depend on factual content of document); Crooker v. IRS, No. 94-0755, 1995 U.S. Dist. LEXIS 7031, at *14 (D.D.C. Apr. 27, 1995) (declaring that "Exemption 7(D) deals with the source and not the content of the information"); Gordon v. Thornberg, 790 F. Supp. 374, 377 (D.R.I. 1992) (defining "confidential" as "provided in confidence or trust; neither the information nor the source need be 'secret'"); Gale v. FBI, 141 F.R.D. 94, 98 (N.D. Ill. 1992) (finding that Exemption 7(D)'s focus is on source of information, not information itself).

²⁸ See, e.g., Jones, 41 F.3d at 247 (clarifying that Exemption 7(D) "does not involve a balancing of public and private interests; if the source was confidential, the exemption may be claimed regardless of the public interest in disclosure"); McDonnell, 4 F.3d at 1257 (stating that Exemption "7(D) does not entail a balancing of public and private interests"); Nadler, 955 F.2d at 1487 n.8 (holding that "[o]nce a source has been found to be confidential, Exemption 7(D) does not require the Government to justify its decision to withhold information against the competing claim that the public interest weighs in favor of disclosure."); Parker v. Department of Justice, 934 F.2d 375, 380 (D.C. Cir. 1991) (stating that "judiciary is not to balance interests under Exemption 7(D)"); Schmerler v. FBI, 900 F.2d 333, 336 (D.C. Cir. 1990) (declaring that "statute admits no such balancing");

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However, in the implementation of the statements of FOIA policy issued by President Clinton²⁹ and Attorney General Janet Reno³⁰ on October 4, 1993--which establish a "foreseeable harm" standard and an accompanying emphasis on discretionary disclosure³¹--the Department of Justice in 1993 adopted an Exemption 7(D) policy that encourages the discretionary disclosure of information furnished by confidential sources whenever possible under the FOIA.³² This policy accommodates the use of a "foreseeable harm" analysis under Exemption 7(D) and promotes the withholding of information only to the extent necessary to prevent source identification.³³

The first clause of Exemption 7(D), with respect to any civil or criminal law enforcement records, focuses upon the identity of a confidential source, rather than the information furnished by the source. The 1974 legislative history of Exemption 7(D), though, plainly evidences Congress's intention to absolutely

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Irons, 811 F.2d at 685 (stating that "the judiciary is not permitted to undertake a balancing of conflicting interests, but is required to uphold a claimed 7(D) exemption so long as the statutory criteria are met"); Katz v. FBI, No. 87-3712, slip op. at 9 (5th Cir. Mar. 30, 1988) (noting that "unlike the privacy exemption, no balancing of interests is allowed once material qualifies for the confidential source exemption"); Brant Constr., 778 F.2d at 1262-63 (observing that "Congress has struck the balance in favor of nondisclosure."); Cuccaro v. Secretary of Labor, 770 F.2d 355, 360 (3d Cir. 1985) (noting that "Exemption 7(D) provides that [information provided by] confidential sources may be withheld and the court is not required to engage in the balancing test of Exemption 7(C)."); Sands v. Murphy, 633 F.2d 968, 971 (1st Cir. 1980) (stating that "a judicial balancing test is not appropriate in applying Exemption 7(D)").

²⁹ President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 3.

³⁰ Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993) [hereinafter Attorney General Reno's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 4-5.

³¹ See FOIA Update, Summer/Fall 1993, at 1-2; see also FOIA Update, Spring 1997, at 1 (describing Attorney General's reiteration of importance of "foreseeable harm" standard to federal agencies in order to promote further discretionary disclosure in agency decisionmaking).

³² See id. at 10 ("Justice Changes Policy on Exemption 7(D) Disclosure") (encouraging agencies not to employ breadth of protection technically available for all source-furnished information under Exemption 7(D)'s second clause).

³³ See id.; see also FOIA Update, Spring 1994, at 3 (distinguishing between two clauses of Exemption 7(D) in implementation of "foreseeable harm" standard); FOIA Update, Fall 1994 at 7 (citing examples of discretionary disclosure of Exemption 7(D) information upon application of "foreseeable harm" standard).

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and comprehensively protect the identity of anyone who provided information to a government agency in confidence.³⁴ Thus, this exemption's first clause protects "both the identity of the informer and information which might reasonably be found to lead to disclosure of such identity."³⁵ Consequently, the courts have readily recognized that the first clause of Exemption 7(D) safeguards not only such obviously identifying information as an informant's name and address,³⁶ but also all information which would "tend to reveal" the source's identity.³⁷

Accordingly, protection for source-identifying information extends well beyond material which is merely a substitute for the source's name. To prevent indirect identification of a source, even the name of a third party who is not a confidential source--but who acted as an intermediary for the source in his deal-

³⁴ See S. Conf. Rep. No. 93-1200, at 13.

³⁵ 120 Cong. Rec. 17033 (1974) (statement of Sen. Hart).

³⁶ See Cuccaro, 770 F.2d at 359-60; Crooker, 1995 U.S. Dist. LEXIS 7031, at *17 (protecting names and addresses); Ferreira v. DEA, 874 F. Supp. 15, 16 (D.D.C. 1995) (protecting names); Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, No. 1:87-2384, slip op. at 12 (N.D. Ohio Apr. 22, 1992) (magistrate's recommendation), adopted (N.D. Ohio May 11, 1992).

³⁷ See Pollard v. FBI, 705 F.2d 1151, 1155 (9th Cir. 1983); Ajluni v. FBI, 947 F. Supp. 599, 606 (N.D.N.Y. 1996) (finding information properly withheld where disclosure could result in narrowing sources "to a limited group of individuals"); Kitchen v. FBI, No. 93-2382, slip op. at 13 (D.D.C. Mar. 18, 1996) (ruling that "Exemption 7(D) protects more than the names of confidential sources; it protects information . . . that might identify such sources"); Mavadia v. Caplinger, No. 95-3542, 1996 WL 592742, at *3 (E.D. La. Oct. 11, 1996) (ordering protection for information that would identify informants); Spannaus v. United States Dep't of Justice, No. 92-0372, slip op. at 15 (D.D.C. June 20, 1995), summary affirmance granted in part, vacated in part & remanded, No. 95-5267, 1996 WL 523814 (D.C. Cir. Aug. 16, 1996); see, e.g., Crooker, 1995 U.S. Dist. LEXIS 7031, at *17 (determining that IRS properly "deleted . . . telephone numbers, recent activities, and other information tending to reveal the identity of confidential informants"); Putnam, 973 F. Supp. at 716 (finding "coded identification numbers, file numbers and information that could be used to identify sources" properly withheld); Ferreira, 874 F. Supp. at 16 (holding that DEA properly withheld identifying information); Church of Scientology v. IRS, 816 F. Supp. 1138, 1161 (W.D. Tex. 1993) (ruling that "agency may withhold any portion of the document that would reveal the identity of the confidential source"); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 21 (D.D.C. 1992) (stating that when source well known to - investigated applicant, agency must protect "even the most oblique indications of identity"); Soto v. DEA, No. 90-1816, slip op. at 6 (D.D.C. Apr. 13, 1992) (finding "dates, locations, and circumstances by which someone familiar with the criminal enterprise could deduce the informant's identity" protected).

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ings with the agency--can be withheld.³⁸ And when circumstances warrant, a law enforcement agency may employ a "Glomar" response--refusing to confirm or deny the very existence of records about a particular individual--if a more specific response to a narrowly targeted request would reflect that he acted as a confidential source.³⁹

Even greater source-identification protection is now provided by the "(c)(2) exclusion,"⁴⁰ which permits a criminal law enforcement agency to entirely exclude records from the FOIA under specified circumstances when necessary to avoid divulging the existence of a source relationship. (See discussion under Exclusions, below.) Additionally, information provided by a source may be withheld under the first clause of Exemption 7(D) wherever disclosure of that information would permit the "linking" of a source to specific source-provided material.⁴¹

Informants' identities are protected wherever they have provided information under either an express promise of confidentiality⁴² or "under circumstances from which such an assurance could be reasonably inferred."⁴³ Courts have uniformly recognized that express promises of confidentiality are deserving of

³⁸ See Birch v. United States Postal Serv., 803 F.2d 1206, 1212 (D.C. Cir. 1986); United Techs., 777 F.2d at 95.

³⁹ See Benavides v. DEA, 769 F. Supp. 380, 381-82 (D.D.C. 1990), rev'd & remanded on procedural grounds, 968 F.2d 1243 (D.C. Cir.), modified, 976 F.2d 751 (D.C. Cir. 1992).

⁴⁰ 5 U.S.C. § 552(c)(2).

⁴¹ See L&C Marine Transp., 740 F.2d at 923-25; see, e.g., Stone v. Defense Investigative Serv., 816 F. Supp. 782, 788 (D.D.C. 1993) (withholding proper where "information so singular that to release it would likely identify the individual"); Barrett v. OSHA, No. C2-90-147, slip op. at 13 (S.D. Ohio Oct. 18, 1990) (protecting statements obtained from witnesses regarding single incident involving only three or four persons).

⁴² See Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 814 (9th Cir. 1995) ("[A]n express promise of confidentiality is 'virtually unassailable' [and is] easy to prove: 'The FBI need only establish the informant was told his name would be held in confidence.'" (quoting Wiener v. FBI, 943 F.2d 972, 986 (9th Cir. 1991)), petition for cert. dismissed, 116 S. Ct. 833 (1996); Jones, 41 F.3d at 248 (stating that "Landano did not disturb the obvious point that sources who spoke with express assurances of confidentiality are always 'confidential' for FOIA purposes"); McDonnell, 4 F.3d at 1258 (holding that "identity of and information provided by [persons given express assurances of confidentiality] are exempt from disclosure under the express language of Exemption 7(D)"); Buhovecky v. Department of Justice, 700 F. Supp. 566, 571 (D.D.C. 1988) (ruling that "there is clear authority to withhold the names of those sources to whom confidentiality was expressly granted").

⁴³ S. Conf. Rep. No. 93-1200, at 13; see Landano, 508 U.S. at 171, 176.

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protection under Exemption 7(D),⁴⁴ but have come to require affidavits demonstrating the existence of such an express promise,⁴⁵ sometimes even with

⁴⁴ See, e.g., Williams, 69 F.3d at 1159 (finding information provided under express assurances of confidentiality to be exempt from disclosure); Jones, 41 F.3d at 248 ("[o]n the basis of [court's] in camera review," express confidentiality justified); KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. 1990) (upholding express assurances of confidentiality given interviewees who provided information regarding postal employee who shot and killed fellow workers); Birch, 803 F.2d at 1212 (withholding proper when "informant requested and received express assurances of confidentiality prior to assisting the investigation"); Jimenez v. FBI, 938 F. Supp. 21, 30 (D.D.C. 1996) (withholding ruled proper when source who "provided information about possible suppliers or illegal drugs" was expressly promised confidentiality by DEA); Gomez v. United States Attorney, No. 93-2530, slip op. at 12 (D.D.C. Apr. 1, 1996) (information may be withheld pursuant to Exemption 7(D) when symbol-numbered sources given express promises of confidentiality), appeal voluntarily dismissed, No. 96-5185 (D.C. Cir. May 12, 1997); Kitchen, No. 93-2035, slip op. at 14-15 (D.D.C. Oct. 11, 1995) (withholding proper when "coded informants and other cooperating citizens . . . were given express assurances of confidentiality"); Mittleman v. OPM, No. 92-0158, slip op. at 2 & n.2 (D.D.C. Jan. 18, 1995) (withholding proper when sources given express promise of confidentiality during OPM's background investigation), aff'd on other grounds per curiam, 76 F.3d 1240 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 975 (1997); Bostic v. FBI, No. 1:94 CV 71, slip op. at 13 (W.D. Mich. Dec. 16, 1994) (withholding proper when court's in camera inspection of plaintiff's EEO file reveals that source was expressly promised confidentiality); Cappabianca v. Commissioner, United States Customs Serv., 847 F. Supp. 1558, 1566 (M.D. Fla. 1994) (explaining that "application of Landano to a case where a witness [to an internal investigation] gave full cooperation only after receiving an express assurance of confidentiality . . . clearly leads to the conclusion that the witness is a confidential source"); Savada v. DOD, 755 F. Supp. 6, 8 (D.D.C. 1991) (withholding proper when Defense Investigative Service "released cover sheets . . . which demonstrate that the sources . . . desired confidentiality"); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 21 (D.D.C. 1991) (withholding proper when "source explicitly requested that his identity be kept confidential"), aff'd, 980 F.2d 782 (D.C. Cir. 1992).

⁴⁵ See King v. United States Dep't of Justice, 830 F.2d 210, 235 (D.C. Cir. 1987) (finding express confidentiality when agency shows "documents marked 'confidential informant' at the time of their compilation"); Mavadia, 1996 WL 592742, at *3 (finding that agency's affidavit demonstrates sources given express assurances of confidentiality as to their identities); Engelking v. DEA, No. 91-0165, 1997 U.S. Dist. LEXIS 1881, at *5 (D.D.C. Feb. 21, 1997) (finding that express confidentiality indicated when source not identified and when agency document marked for restricted dissemination), aff'd per curiam, 119 F.3d 980 (D.C. Cir. 1997); Canning v. United States Dep't of Justice, No. 92-0463, slip op. at 8 (D.D.C. June 23, 1995) (finding express confidentiality when "documents themselves reflected that express assurances of confidentiality had been given to

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regard to symbol-numbered sources.⁴⁶ Several courts have held that the identities of persons providing statements in response to routinely given "unsolicited assurances of confidentiality" are protectable under Exemption 7(D) as well.⁴⁷

⁴⁵(...continued)

the sources"); Plazas-Martinez v. DEA, 891 F. Supp. 1, 4 (D.D.C. 1995) (finding agency's affidavit established express promise of confidentiality for informant in drug-trafficking investigation); Butler v. Department of the Air Force, 888 F. Supp. 174, 181 (D.D.C. 1995) (declaring that express confidentiality exists when agency attests that "disclosure would violate an express request for confidentiality by the source of the information"), aff'd per curiam, 116 F.3d 941 (D.C. Cir. 1997) (unpublished table decision); Lesar v. United States Dep't of Justice, No. 92-2216, slip op. at 4 (D.D.C. Mar. 14, 1995) (agency attestation that "[p]lacing the term '(protect identity)' after the name of the source" to indicate source expressly promised confidentiality constitutes sufficient showing under Exemption 7(D)); see also Voinche v. FBI, 940 F. Supp. 323, 331 (D.D.C. 1996) (agency's affidavit adequately showed either express or implied assurances of confidentiality for sources), aff'd, No. 96-5304, 1997 U.S. App. LEXIS 19089 (D.C. Cir. June 19, 1997), petition for cert. filed, 66 U.S.L.W. 3178 (U.S. Sept. 2, 1997) (No. 97-383); cf. Steinberg v. United States Dep't of Justice, No. 93-2409, slip op. at 14 (D.D.C. July 14, 1997) (ordering supplemental affidavit where agency's generalized statement concerning maintenance of future cooperation of sources insufficient to demonstrate express assurances of confidentiality).

⁴⁶ See Davin v. United States Dep't of Justice, 60 F.3d 1043, 1062 (3d Cir. 1995) (stating that "government . . . must produce evidence of its alleged policy and practice of giving all symbol numbered informants or code name sources express assurances of confidentiality, evidence that the policy was in force throughout the [time] spanned by the documents . . . and evidence that the policy was applied to each of the separate investigations and in each case in which a document or portion has been withheld") (petition for rehearing en banc pending); Rosenfeld, 57 F.3d at 81 (determining that FBI affidavits do not demonstrate that symbol-numbered sources were given express promises of confidentiality). But see, e.g., Manna v. United States Dep't of Justice, 51 F.3d 1158, 1167 (3d Cir.) (finding that express confidentiality exists as to sources "assigned numbers" who provided information regarding organized crime), cert. denied, 116 S. Ct. 477 (1995); McDonnell, 4 F.3d at 1258 (reasoning that "source was considered so sensitive that he or she was assigned a symbol source number and was never referred to by name in the file [leading to the] conclusion that [the information is] exempt from disclosure under the express language of Exemption 7(D)"); Wickline, No. 92-1189, slip op. at 9 (D.D.C. Sept. 30, 1994) (holding sufficient agency attestation that "permanent source's ongoing relationship with the FBI involves an 'express assurance' that his or her identity will not be disclosed either directly or indirectly").

⁴⁷ See, e.g., Brant Constr., 778 F.2d at 1263; L&C Marine Transp., 740 F.2d at 924 n.5; Pope, 599 F.2d at 1386-87; Borton, Inc. v. OSHA, 566 F. Supp. at 1422; see also Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, (continued...)

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In the past, there existed a conflict in the case law as to the availability of Exemption 7(D) protection for sources who were advised that they might be called to testify if a trial eventually were to take place.⁴⁸ However, in United States Department of Justice v. Landano,⁴⁹ the Supreme Court resolved this conflict by holding that "[a] source should be deemed confidential if the source furnished information with the understanding that the [agency] would not divulge the communication except to the extent . . . thought necessary for law enforcement purposes."⁵⁰ (It should be noted that the effect of a source's actual testimony upon continued Exemption 7(D) protection presents a distinctly different issue,⁵¹ which is addressed below together with other issues regarding waiver of this exemption.)

In contrast to the situation involving express confidentiality, a particularly difficult issue under Exemption 7(D) involves the circumstances under which an expectation of confidentiality can be shown to have been implied. An implicit promise of confidentiality may be discerned from the inherent sensitivity of both criminal and civil investigations.⁵² Over the years, a number of courts of appeals

⁴⁷(...continued)

239 (1st Cir. 1994) (ruling that "investigator's policy of affording confidentiality in interviews is an adequate basis upon which the government may consider the information provided . . . confidential"); Providence Journal, 981 F.2d at 555, 565 (finding express promises of confidentiality for 24 individuals based upon IG regulation); Badalamenti, 899 F. Supp. at 549 (withholding proper when agency attests that expectation of confidentiality for information about criminal activity documented by governing body of Interpol by resolutions); Kuffel, 882 F. Supp. at 1125 (discussing how "ongoing understanding" between local law enforcement agencies and FBI that information shared about criminal investigation conducted by local agency would remain confidential alone could support conclusion that explicit grant of confidentiality existed). But see Davin, 60 F.3d at 1061 (finding agency's "alleged" policy of granting express promises of confidentiality on routine basis insufficient; agency required to provide "probative evidence" of consistent policy of expressly granting confidentiality).

⁴⁸ Compare Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 986 (9th Cir. 1985) (no confidentiality recognized), and Poss v. NLRB, 565 F.2d 654, 658 (10th Cir. 1977) (same), with Irons, 811 F.2d at 687 (confidentiality recognized); Schmerler, 900 F.2d at 339 (same), and United Techs., 777 F.2d at 95 (same).

⁴⁹ 508 U.S. 165 (1993).

⁵⁰ Id. at 174 (clarifying that "'confidential,' as used in Exemption 7(D), refers to a degree of confidentiality less than total secrecy").

⁵¹ See Parker, 934 F.2d at 381.

⁵² See, e.g., United Techs., 777 F.2d at 94 (employee-informant's fear of employer retaliation raised expectation of confidentiality); see also Voelker v.

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employed a "presumption" of confidentiality in criminal cases, particularly those involving the FBI.⁵³ Historically, these courts applied a "categorical" approach to this aspect of Exemption 7(D), of the type generally approved by the Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of the Press,⁵⁴ thereby eliminating the burdensome task for criminal law enforcement agencies of proving implied confidentiality on a case-by-case basis. In 1993, however, the Supreme Court effectively reversed all of these cases on this point of evidentiary presumption in Landano.⁵⁵

At issue in Landano was "whether the Government is entitled to a presumption that all sources supplying information to the Federal Bureau of Investigation . . . in the course of a criminal investigation are confidential sources."⁵⁶ In deciding Landano, the Supreme Court first made it clear that its decision affects only implied assurances of confidentiality⁵⁷ and that a source need not have an expectation of "total secrecy" in order to be deemed a confidential source.⁵⁸

⁵²(...continued)

FBI, 638 F. Supp. 571, 573 (E.D. Mo. 1986) (identifying individuals who supplied information in FBI background investigation could subject them to "possible loss of business or social standing, ridicule, harassment, and even bodily harm") (Privacy Act case).

⁵³ D.C. Circuit: Parker, 934 F.2d at 378; Dow Jones, 917 F.2d at 576; Schmerler, 900 F.2d at 337; Second Circuit: Donovan v. FBI, 806 F.2d 55, 61 (2d Cir. 1986); Diamond v. FBI, 707 F.2d 75, 78 (2d Cir. 1983); Sixth Circuit: Ingle v. Department of Justice, 698 F.2d 259, 269 (6th Cir. 1983); Seventh Circuit: Kimberlin v. Department of the Treasury, 774 F.2d 204, 208 (7th Cir. 1985); Miller, 661 F.2d at 627; Eighth Circuit: Parton, 727 F.2d at 776; Tenth Circuit: KTVY-TV, 919 F.2d at 1470; Hopkinson, 866 F.2d at 1222-23; Eleventh Circuit: Nadler, 955 F.2d at 1486 & n.7. But see Wiener, 943 F.2d at 986 (observing that "a claim that confidentiality was impliedly granted . . . requires the court to engage in a highly contextual, fact-based inquiry"); Lame v. United States Dep't of Justice, 654 F.2d 917, 928 (3d Cir. 1981) (requiring "detailed explanations relating to each alleged confidential source" so that court can determine whether Exemption 7(D) withholding appropriate as to "each source").

⁵⁴ 489 U.S. 749 (1989).

⁵⁵ See Landano, 508 U.S. at 179-80.

⁵⁶ Id. at 167.

⁵⁷ See id. at 172 (acknowledging that "precise question before us . . . is how the Government can meet its burden of showing that a source provided information on an implied assurance of confidentiality"); see Rosenfeld, 57 F.3d at 814 (stating that "Landano did not affect the application of Exemption 7(D) to sources and information covered by an express assurance of confidentiality").

⁵⁸ Landano, 508 U.S. at 174 (observing that "an exemption so limited that it
(continued...)

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However, the Court found that it was not Congress' intent to provide for a "universal" presumption or broad categorical withholding under Exemption 7(D);⁵⁹ rather, it declared, a "more particularized approach" is required.⁶⁰ Under this newer approach, agencies seeking to invoke Exemption 7(D) must prove expectations of confidentiality based upon the "circumstances" of each case.⁶¹

Such specific showings of confidentiality, the Court indicated, can be made

⁵⁸(...continued)

covered only sources who reasonably could expect total anonymity would be, as a practical matter, no exemption at all"); see Cappabianca, 847 F. Supp. at 1566 (stating that "[t]he Landano Court noted that 'confidential' does not necessarily mean completely secret, but that a statement may still be made in confidence when the speaker knows it will be shared with limited others"); Butler v. United States Dep't of Justice, No. 86-2255, 1994 WL 55621, at *6 (D.D.C. Feb. 3, 1994) (holding that "source need not be promised total secrecy . . . for material to be covered by [Exemption 7(D)]"), appeal voluntarily dismissed, No. 94-5078 (D.C. Cir. Sept. 8, 1994).

⁵⁹ Landano, 508 U.S. at 174-78; see Rosenfeld, 57 F.3d at 814 (reiterating that "presumption of confidentiality [no longer] attaches from the mere fact of an FBI investigation [Instead] the confidentiality determination turns on the circumstances under which the subject provided the requested information."); Jones, 41 F.3d at 247 (observing that "[Supreme] Court unanimously held that the government is not entitled to a presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential within the meaning of Exemption 7(D)"); Lesar v. United States Dep't of Justice, No. 92-2216, slip op. at 10 (D.D.C. Oct. 18, 1993) (stating that "Supreme Court recently rejected the presumption that all FBI sources should be deemed confidential").

⁶⁰ Landano, 508 U.S. at 179-80; see Quiñon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (restating that "[Supreme] Court rejected . . . a broad presumption of confidentiality in favor of a 'particularized approach' that looks to 'factors such as the nature of the crime that was investigated and the source's relation to it' in order to determine whether a promise of confidentiality may be inferred" (quoting Landano, 508 U.S. at 179-80)); Steinberg v. United States Dep't of Justice, 23 F.3d 548, 549 (D.C. Cir. 1994) (stating that Landano requires government to make "more particularized showing" of confidentiality"); LeGrand, No. 94-0300, slip op. at 10 (applying Landano, "a particularized showing that the information was provided in confidence must be made"); cf. Computer Prof'ls for Soc. Responsibility v. United States Secret Serv., 72 F.3d 897, 906 (D.C. Cir. 1996) (holding that "the manner in which an agency 'routinely' handles information is not sufficient to establish an implied assurance of confidentiality").

⁶¹ Landano, 508 U.S. at 180; see Hale v. United States Dep't of Justice, 99 F.3d 1025, 1030 (10th Cir. 1996) (explaining that inferences of confidentiality "should be evaluated on a case-by-case basis"); see also FOIA Update, Summer/Fall 1993, at 10.

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on a "generic" basis,⁶² when "certain circumstances characteristically support an inference of confidentiality" ⁶³ Throughout Landano, the Court stressed two "factors" to be applied in deciding whether implicit confidentiality exists: "the nature of the crime . . . and the source's relation to it."⁶⁴ It also pointed to five lower court rulings in which courts highlighted the potential for harm to the witnesses involved, as examples of decisions in which courts have correctly applied these two factors.⁶⁵

Henceforth, law enforcement agencies seeking to invoke Exemption 7(D) for "implied confidentiality" sources will have to specifically address both factors in order to meet Landano's higher evidentiary standard on a case-by-case basis,⁶⁶ which in practice should result in greater disclosure in many instances.⁶⁷

⁶² Landano, 508 U.S. at 179.

⁶³ Id. at 177; see Isley v. Executive Office for United States Attorneys, No. 96-0123, slip op. at 8 (D.D.C. Mar. 27, 1997) (finding agency presented sufficient evidence pertaining to murder investigation to support "generic circumstances" of implied confidentiality), appeal dismissed, No. 97-5105 (D.C. Cir. Sept. 8, 1997); Butler v. Department of the Treasury, No. 95-1931, 1997 U.S. Dist. LEXIS 802, at *10 (D.D.C. Jan. 14, 1997) (emphasizing that monitoring of conversation in prison setting between cooperating sources and plaintiff "is precisely the situation contemplated by the 'generic' circumstances of confidentiality" in Landano); see also McNamara v. United States Dep't of Justice, No. P-96-CA-050, 1997 U.S. Dist. LEXIS 12059, at *52 (W.D. Tex. Aug. 12, 1997) (ruling that major narcotics conspiracy case involved circumstances that characteristically support inference of confidentiality); Steinberg, No. 93-2409, slip op. at 15 (D.D.C. July 14, 1997) (finding it reasonable to infer confidentiality under circumstances of case involving foreign source, drug trafficking, and possible assassination).

⁶⁴ Landano, 508 U.S. at 179.

⁶⁵ Id. at 179-80 (citing Keys v. United States Dep't of Justice, 830 F.2d 337, 345-46 (D.C. Cir. 1987) (believing that individuals providing information regarding possible Communist sympathies, criminal activity, and murder by foreign operatives would have worried about retaliation); Donovan, 806 F.2d at 60-61 (ruling that individuals providing information about four American churchwomen murdered in El Salvador may likely face fear of disclosure); Parton, 727 F.2d at 776-77 (asserting that prison officials providing information regarding alleged attack on inmate faced "high probability of reprisal"); Nix v. United States, 572 F.2d 998, 1003-04 (4th Cir. 1978) (finding implicit confidentiality where guards and prison inmates providing information about guards who allegedly beat another inmate face risk of reprisal); Miller, 661 F.2d at 628 (determining that individuals providing information about self-proclaimed litigious subject seeking to enlist them in "anti-government crusades" faced "strong potential for harassment"))).

⁶⁶ 508 U.S. at 180; see Hale, 99 F.3d at 1030.

⁶⁷ See FOIA Update, Summer/Fall 1993, at 10 (emphasizing applicability of
(continued...))

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In the wake of the Supreme Court's decision in Landano, several courts remanded this issue for further review or allowed the government the opportunity to submit supplemental filings in accordance with Landano's evidentiary requirements.⁶⁸ A majority of the courts that have addressed the issue under Landano thus far have recognized the nature of the crime and the source's relation to it as the primary factors in determining whether implied confidentiality exists.⁶⁹ In this vein, though, a number of courts have found insufficient the government's attestations as to the circumstances surrounding a claim of implied confidentiality, instead holding that a more "specific" showing as to the nature of the crime and the source's relation to it is required under Landano.⁷⁰ For example,

⁶⁷(...continued)

new standards to "institutional" sources as examples of greater disclosure); see also FOIA Update, Spring 1994, at 3 (emphasizing stringency of new disclosure requirements).

⁶⁸ See, e.g., Quiñon, 86 F.3d at 1232; Davin, 60 F.3d at 1063; Steinberg, 23 F.3d at 549; Neill v. Department of Justice, No. 93-5292, 1994 WL 88219, at *1 (D.C. Cir. Mar. 9, 1994); McDonnell, 4 F.3d at 1262; Massey v. FBI, 3 F.3d 620, 623-24 (2d Cir. 1993); Hale v. United States Dep't of Justice, 2 F.3d 1055, 1058 (10th Cir. 1993); Selby v. United States Dep't of Justice, No. 92-56348, slip op. at 1 (9th Cir. July 26, 1993); Ferguson v. FBI, No. 92-6272, slip op. at 2 (2d Cir. July 19, 1993); Oliva v. United States Dep't of Justice, 996 F.2d 1475, 1477 (2d Cir. 1993); Lesar, No. 92-2216, slip op. at 12 (D.D.C. Oct. 18, 1993); Cucci, 871 F. Supp. at 513; Manchester v. DEA, 823 F. Supp. 1259, 1262 (E.D. Pa. 1993), aff'd, 40 F.3d 1240 (3d Cir. 1994) (unpublished table decision).

⁶⁹ See Hale, 99 F.3d 1030; Quiñon, 86 F.3d at 1231; Ortiz, 70 F.3d at 733; Williams, 69 F.3d at 1159; Davin, 60 F.3d at 1063; Rosenfeld, 57 F.3d at 814; Jones, 41 F.3d at 247-48; Steinberg, 23 F.3d at 549; Koch v. United States Postal Serv., No. 93-1487, slip op. at 3 (8th Cir. Oct. 8, 1993); McDonnell, 4 F.3d at 1260; Massey, 3 F.3d at 623; Gomez, No. 93-2530, slip op. at 12 (D.D.C. Apr. 1, 1996); Code v. FBI, No. 95-1892, 1997 WL 150070, at **8-9 (D.D.C. Mar. 26, 1997); Kitchen, No. 93-2382, slip op. at 12 (D.D.C. Mar. 18, 1996); Wickline v. FBI, 923 F. Supp. 1, 3 (D.D.C. 1996); Steinberg, No. 93-2409, slip op. at 24 (D.D.C. Oct. 31, 1995); Kitchen, No. 93-2035, slip op. at 15 (D.D.C. Oct. 11, 1995); LeGrand, No. 94-0300, slip op. at 11 (S.D.N.Y. July 10, 1995) (magistrate's recommendation), adopted (S.D.N.Y. Nov. 29, 1995); Linn v. United States Dep't of Justice, No. 92-1406, 1995 WL 631847, at *34 (D.D.C. Aug. 22, 1995); Linn, 1995 WL 417810, at *10; Cudzich v. INS, 886 F. Supp. 101, 107 (D.D.C. 1995); Anderson, No. 92-0225, slip op. at 10 (W.D. Pa. May 18, 1994); Putnam, 873 F. Supp. at 716-17; Kuffel, 882 F. Supp. at 1125; Valera v. DEA, No. 92-0575, slip op. at 5 (M.D. Fla. Sept. 20, 1994) (magistrate's recommendation), adopted (M.D. Fla. Oct. 19, 1994); Manna v. United States Dep't of Justice, 832 F. Supp. 866, 876-77 (D.N.J. 1993), aff'd, 51 F.3d 1158 (3d Cir.), cert. denied, 116 S. Ct. 477 (1995); Manchester, 823 F. Supp. at 1262.

⁷⁰ See Hale, 99 F.3d at 1033 (finding government's claim of implied confidentiality lacked particularized justification); Linn, 1995 WL 417810, at **15-16, (continued...)

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the Court of Appeals for the First Circuit recently held that "[i]t is not enough . . . for the government simply to state blandly that the source's relationship to the crime permits an inference of confidentiality. Rather, the government has an obligation to spell out that relationship . . . [without] compromising the very interests it is seeking to protect."⁷¹

Numerous courts have now applied these factors to determine whether there existed implied confidentiality under Landano.⁷² These courts have uniformly recognized as a key consideration the potential for retaliation against the source,⁷³ and have found that such a possibility for retaliation existed for paid in-

⁷⁰(...continued)

32 (determining that agency failed to link document's use to particular documents, to specify nature of material withheld and to explain why withheld information could not be segregated); Senate of P.R. v. United States Dep't of Justice, No. 84-1829, 1993 U.S. Dist. LEXIS 12162, at **35-36 (D.D.C. Aug. 24, 1993) (charging that government "has not carried its burden [in light of Landano] of justifying its nondisclosure of the documents, and the documents must be released"); see also Ajluni v. FBI, No. 94-CV-325, slip op. at 13 (N.D.N.Y. July 13, 1996) (finding agency's statements "unacceptably conclusory" where circumstances surrounding its receipt of information not described), summary judgment granted, 947 F. Supp. 599, 606 (N.D.N.Y. 1996) (holding, after in camera review, that information was provided under implied assurance of confidentiality).

⁷¹ Scientology Int'l, 30 F.2d at 234.

⁷² See, e.g., Hale, 99 F.3d at 1030-33; Ortiz, 70 F.3d at 733-35; Williams, 69 F.3d at 1159; Rosenfeld, 57 F.3d at 814; Jones, 41 F.3d at 248; Scientology Int'l, 30 F.3d at 239; Bell, No. 93-1485, 1993 U.S. App. LEXIS 27235, at *5; Koch v. United States Postal Serv., No. 93-1487, slip op. at 3 (8th Cir. Oct. 8, 1993); Ajluni, 947 F. Supp. at 606; Campbell v. United States Dep't of Justice, No. 89-3016, 1996 WL 554511, at *9 (D.D.C. Sept. 19, 1996), subsequent decision, No. 89-3016, slip op. at 6 (D.D.C. Aug. 6, 1997) (same for "miscellaneous" file related to national security investigation); Jimenez, 938 F. Supp. at 30; Kitchen, No. 93-2382, slip op. at 12 (D.D.C. Mar. 18, 1996); Wickline, 923 F. Supp. at 3; Perrone v. FBI, 908 F. Supp. 24, 27 (D.D.C. 1995); Steinberg, No. 93-2409, slip op. at 24 (D.D.C. Oct. 31, 1995); Kitchen, No. 93-2035, slip op. at 15 (D.D.C. Oct. 11, 1995); Linn, 1995 WL 631847, at *34; Linn, 1995 WL 417810, at *10; Augarten, 1995 WL 350797, at *2; Cudzich, 886 F. Supp. at 107; Kuffel, 882 F. Supp. at 1125; Almy, 1995 WL 476255, at *13; Putnam, 873 F. Supp. at 716-17; Cucci, 871 F. Supp. at 513; Landano, 873 F. Supp. at 887-88; Valera, No. 92-0575, slip op. at 6 (M.D. Fla. Sept. 20, 1994); Anderson, No. 92-0225, slip op. at 11 (W.D. Pa. May 18, 1994).

⁷³ See Hale, 99 F.3d at 1031 (recognizing that nature of crime supports inference of confidentiality when "discrete aspects" of it "make it particularly likely" for source to fear reprisal); Williams, 69 F.3d at 1159 (finding withholding justified based on "risk of retaliation, harassment and bodily harm"); Koch, No.

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formants,⁷⁴ for anonymous sources,⁷⁵ for symbol-numbered sources,⁷⁶ and also when an employee provided information about an employer.⁷⁷ They have also found implied confidentiality in cases involving investigations of organized

⁷³(...continued)

93-1487, slip op. at 3 (8th Cir. Oct. 8, 1993) (finding withholding proper as to whistleblower who reported another employee's threat to bring grenade in to work because of "nature of alleged threat" and possibility of retaliation); Campbell, 1996 WL 554511, at *9 (approving consideration of sources' fears of retribution); Butler, 1997 U.S. Dist. LEXIS 802, at *10 (recognizing danger of cooperating with prison or law enforcement officials); Jimenez, 938 F. Supp. at 29 (finding withholding of name and identifying information of source proper where plaintiff had previously harassed and threatened government informants); Gomez, No. 93-2530, slip op. at 13 (D.D.C. Mar.

18, 1996) (finding withholding justified because drug trafficking is of a "serious and potentially violent nature"); Kitchen, No. 93-2382, slip op. at 12 (D.D.C. Mar. 18, 1996) (Exemption 7(D) protection warranted because of threat of personal harassment or physical danger in investigation of illegal drug activities); Wickline, 923 F. Supp. at 3 (finding withholding proper based on violent nature of crime when requester had been convicted of multiple dismemberment murders); Perrone, 908 F. Supp. at 27 (withholding proper when those interviewed face fear of retribution or harm based on fact of their cooperation with FBI); Augarten, 1995 WL 350797, at *2 (withholding justified when release "would endanger the life of the sources"); Linn, 1995 WL 631847, at *34 (finding withholding proper when "persons associated with the investigation and prosecution were subject to threats of harm when their cooperation was divulged"); Landano, 873 F. Supp. at 888 (stating that "the violent nature of the crime, the potential involvement of the motorcycle gang, and the broad publication of the murder persuade the court that an implied assurance of confidentiality is warranted"); Putnam, 873 F. Supp. at 716 (fearing retribution, FBI properly withheld "names and information provided by relatives and close associates of the victim and the plaintiff" when former FBI agent pled guilty to first degree manslaughter of an informant); Valera No. 92-0575, slip op. at 5 (M.D. Fla. Sept. 20, 1994) (determining that information regarding individual convicted of racketeering/drug trafficking would "pose a threat of violence to . . . sources if those sources were revealed"); cf. Computer Prof'ls, 72 F.3d at 906 (holding that agency offered no evidence that fear of retaliation was "sufficiently widespread" to justify inference of confidentiality for sources of information and information they provided).

⁷⁴ See, e.g., Jones, 41 F.3d at 248; Anderson, No. 92-0225, slip op. at 11 (W.D. Pa. May 18, 1994); Lesar, No. 92-2216, slip op. at 11 (D.D.C. Oct. 18, 1993).

⁷⁵ See, e.g., Ortiz, 70 F.3d at 733.

⁷⁶ See, e.g., Tamayo v. United States Dep't of Justice, 932 F. Supp. 342, 345 (D.D.C. 1996), summary affirmance granted, 1997 U.S. App. LEXIS 16367 (D.C. Cir. May 22, 1997); Jones, 41 F.3d at 248; Putnam, 873 F. Supp. at 716.

⁷⁷ See, e.g., Government Accountability Project, No. 86-3201, slip op. at 9-10 (D.D.C. June 30, 1993).

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crime,⁷⁸ murder,⁷⁹ drug trafficking,⁸⁰ extortion,⁸¹ illegal possession of firearms,⁸² domestic terrorism,⁸³ national security,⁸⁴ loan sharking and gambling,⁸⁵ and interstate transportation of stolen property.⁸⁶ Likewise, implied confidentiality has been found where former members of targeted organizations disclose self-incriminating information⁸⁷ and where sources provide information as a result of plea-bargains.⁸⁸

⁷⁸ See, e.g., Wickline, 923 F. Supp. at 3 (organized crime case); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (major racketeering investigation), summary affirmance granted, No. 95-5388 (D.C. Cir. Jan. 24, 1997); Cudzich, 886 F. Supp. at 107 (suspected alien smuggling ring); Landano, 873 F. Supp. at 888 (possible motorcycle gang-related violence); Anderson, No. 92-0225, slip op. at 11 (W.D. Pa. May 18, 1994) (gang-related shootings); Manna, 832 F. Supp. at 876 (organized crime activity).

⁷⁹ See, e.g., Isley, No. 96-0123, slip op. at 8 (D.D.C. Mar. 27, 1997); Wickline, 923 F. Supp. at 3; Eagle Horse v. FBI, No. 92-2357, slip op. at 1, 5 (D.D.C. July 28, 1995); LeGrand, No. 94-0300, slip op. at 12 (S.D.N.Y. July 10, 1995); Proctor v. United States Dep't of Justice, No. 88-3340, slip op. at *1 (D.D.C. Aug. 8, 1994); Linn, 1995 WL 417810, at *11; Putnam, 873 F. Supp. at 716; Landano, 873 F. Supp. at 888.

⁸⁰ See, e.g., Bell, 1993 U.S. App. LEXIS 27235, at *5; McNamara, 1997 U.S. Dist. LEXIS 12059, at *52; Jimenez, 938 F. Supp. at 29; Gomez, No. 93-2530, slip op. at 12-13 (D.D.C. Apr. 1, 1996); Kitchen, No. 93-2382, slip op. at 12 (D.D.C. Mar. 18, 1996); Perrone, 908 F. Supp. at 27; Kitchen, No. 93-2035, slip op. at 7, 16 (D.D.C. Oct. 11, 1995); Delviscovo, 903 F. Supp. at 3; Badalamenti, 899 F. Supp. at 549; Linn, 1995 WL 417810, at *11; Valera, No. 92-0575, slip op. at 5, (M.D. Fla. Sept. 20, 1994); Kennedy, 1994 U.S. Dist. LEXIS 2275, at *2.

⁸¹ See, e.g., Perrone, 908 F. Supp. at 27; Delviscovo, 903 F. Supp. at 3.

⁸² See Perrone, 908 F. Supp. at 27.

⁸³ See, e.g., Ajluni, 947 F. Supp. at 602, 606; Steinberg, No. 93-2409, slip op. at 24 (D.D.C. Oct. 31, 1995).

⁸⁴ See Campbell, 1996 WL 554511, at *9 (finding implied confidential relationship established "given the customary trust" that exists for relaying information between nonfederal and foreign law enforcement agencies and FBI).

⁸⁵ See Delviscovo, 903 F. Supp. at 3.

⁸⁶ See id.

⁸⁷ See Campbell, 1996 WL 554511, at *9.

⁸⁸ See Engelking v. DEA, 1997 U.S. Dist. LEXIS 1881, at *6 (finding implied confidentiality and observing that plea bargains frequently are only way to obtain information about other suspected criminals).

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The second clause of Exemption 7(D) broadly protects all information furnished to law enforcement authorities by confidential sources in the course of criminal or lawful national security intelligence investigations.⁸⁹ Thus, the statutory requirement of an "investigation," while no longer a component of Exemption 7's threshold language, remains "a predicate of exemption under the second clause of paragraph (D)."⁹⁰ For the purposes of this clause, criminal law enforcement authorities include federal agency inspectors general.⁹¹

In an interesting elaboration on the definition of a "criminal investigation," courts have recognized that information originally compiled by local law enforcement authorities in conjunction with a nonfederal criminal investigation fully retains its criminal investigatory character when subsequently obtained by federal authorities,⁹² even if received solely for use in a federal civil enforcement proceeding.⁹³ In addition, protection for source-provided information has been extended to information supplied to federal officials by state or local enforcement

⁸⁹ See Shaw, 749 F.2d at 63-65 (articulating standard for determining if law enforcement undertaking satisfies "criminal investigation" threshold); see also Pray v. Department of Justice, No. 95-5383, 1996 WL 734142, at *1 (D.C. Cir. Nov. 20, 1996) (per curiam) (upholding agency's use of Exemption 7(D) for source information); Ferguson, 957 F.2d at 1069 (finding FBI's withholding of publicly circulated material provided to it by confidential source proper); Reiter v. DEA, No. 96-0378, 1997 WL 470108, at *6 (D.D.C. Aug. 13, 1997) (holding all source-supplied information protected when source is confidential); Kuffel, 882 F. Supp. at 1126 ("qualifying criminal investigation" exists when "FBI gather[s] information on criminals who violated specific state crimes for the purpose of using the information as possible leads in investigations of robberies and burglaries that could be in violation of federal law"); Meeropol v. Smith, No. 75-1121, slip op. at 76-78 (D.D.C. Feb. 29, 1984) (protecting information obtained during intelligence investigations), aff'd in part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

⁹⁰ Keys, 830 F.2d at 343.

⁹¹ See Ortiz, 70 F.3d at 732 (ruling that Exemption 7(D) properly applied when "HHS's Office of Inspector General . . . use[d anonymous] letter to launch a criminal investigation"); Providence Journal, 981 F.2d at 563 n.13 (deeming Inspectors General same as criminal law enforcement authorities); Brant Constr., 778 F.2d at 1265 (recognizing "substantial similarities between the activities of the FBI and the OIGs").

⁹² See Harvey v. United States Dep't of Justice, 747 F. Supp. 29, 38 (D.D.C. 1990).

⁹³ See Cleveland, No. 1:87-2384, slip op. at 12 n.3 (N.D. Ohio Apr. 22, 1992) (holding that Exemption 7(D) "clearly applies to information obtained from confidential sources in all investigations, both civil and criminal"); Dayo v. INS, No. C-2-83-1422, slip op. at 5-6 (S.D. Ohio Dec. 31, 1985).

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authorities seeking assistance in pursuing a nonfederal investigation.⁹⁴

Under the case law, the confidential source information that falls within the broad coverage of this second clause of Exemption 7(D) need not necessarily be source-identifying.⁹⁵ Thus, under the second clause of Exemption 7(D), courts have permitted the withholding of confidential information even after the source's identity has been officially divulged or acknowledged,⁹⁶ or when the requester knows the source's identity.⁹⁷ Similarly, information provided by an anonymous

⁹⁴ See Hopkinson, 866 F.2d at 1222 (protecting state law enforcement agency's request for FBI laboratory evaluation of evidence submitted by state agency and results of FBI's analysis); Gordon, 790 F. Supp. at 377-78 (emphasizing that "when a state law enforcement agency sends material to an FBI lab for testing, confidentiality is 'inherently implicit'[] . . . all information from another agency must be protected to provide the confidence necessary to law enforcement cooperation"); Rojem v. United States Dep't of Justice, 775 F. Supp. 6, 12 (D.D.C. 1991) (finding that disclosure of file "would unduly discourage" states from enlisting FBI's assistance), appeal dismissed for failure to timely file, No. 92-5088 (D.C. Cir. Nov. 4, 1992); Payne v. United States Dep't of Justice, 722 F. Supp. 229, 231 (E.D. Pa. 1989) (stating that "requirement is met . . . [when] the documents sought are FBI laboratory and fingerprint examinations of evidence collected by local law enforcement agencies"), aff'd, 904 F.2d 695 (3d Cir. 1990) (unpublished table decision).

⁹⁵ See Parker, 934 F.2d at 375; Shaw, 749 F.2d at 61-62; Radowich, 658 F.2d at 964; Duffin v. Carlson, 636 F.2d 709, 712 (D.C. Cir. 1980); Simon, 752 F. Supp. at 22; see also FOIA Update, Summer/Fall 1993, at 10 (pointing out breadth of this coverage, together with corresponding potential for discretionary disclosure). See generally FOIA Update, Spring 1994, at 3 (discussing application of "foreseeable harm" standard to Exemption 7(D)).

⁹⁶ See, e.g., Ferguson, 957 F.2d at 1068 (holding that subsequent disclosure of source's identity or some of information provided by source does not require "full disclosure of information provided by such a source"); Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 185 (D.N.H. 1993) (ruling that source's identity or information provided need not be "secret" to justify withholding); Church of Scientology, 816 F. Supp. at 1161 (declaring it "irrelevant that the identity of the confidential source is known"); see also Cleary v. FBI, 811 F.2d 421, 423 (8th Cir. 1987); Shaw, 749 F.2d at 62; Radowich, 658 F.2d at 964; Lesar, 636 F.2d at 491.

⁹⁷ See, e.g., Jones, 41 F.3d at 249 (explaining that Exemption 7(D) "focuses on the source's intent, not the world's knowledge"); Radowich, 658 F.2d at 960 (advancing that Exemption 7(D) applies even when "identities of confidential sources were known"); see also L&C Marine Transp., 740 F.2d at 923, 925 (noting that fact that employee-witnesses could be matched to their statements does not diminish Exemption 7(D) protection); Keeney v. FBI, 630 F.2d 114, 119 n.2 (2d Cir. 1980) (ruling that Exemption 7(D) applies to "local law enforcement agencies [that] have now been identified"); Crooker, 1995 U.S. Dist. LEXIS

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source is eligible for protection.⁹⁸ Moreover, even when source-provided information has been revealed and the identities of some of the confidential sources independently divulged, Exemption 7(D) can protect against the matching of witnesses' names with the specific information that they supplied.⁹⁹

Because the phrase "confidential information furnished only by the confidential source" sometimes caused confusion in the past, the 1986 FOIA amendments unequivocally clarified the congressional intent by deleting the word "confidential" as a modifier of "information" and omitting the word "only" from this formulation. Even prior to that legislative change, courts regularly employed this portion of Exemption 7(D) to protect all information provided by a confidential source, both because such withholdings were anticipated by the language and legislative history of the statute,¹⁰⁰ and in recognition of the fact that disclosure of any of this material would jeopardize the system of confidentiality that ensures a free flow of information from sources to investigatory agencies.¹⁰¹ Now,

⁹⁷(...continued)

7031, at *15 (stating that "an agency may withhold confidential information even if the requester or the public know[s] the source's identity"); Wickline, No. 92-1189, slip op. at 10 n.8 (D.D.C. Sept. 30, 1994) (reiterating that "confidentiality is not waived or revoked when a [requester] already knows the protected names"); Shafmaster Fishing Co., 814 F. Supp. at 185 (stating that source's identity need not be secret to justify withholding information under Exemption 7(D)); Sanders, 1992 WL 97785, at *4 (holding that fact that requester knows identity of source does not eviscerate Exemption 7(D) protection).

⁹⁸ See Ortiz, 70 F.3d at 735 (extending confidentiality to anonymous hotline communications "reflects a common sense judgment" given the importance of encouraging public cooperation in combatting fraud); Providence Journal, 981 F.2d at 565-67 (extending confidentiality to unsolicited anonymous letters regarding investigation against officers in Rhode Island Army National Guard); Mitchell v. Ralston, No. 81-4478, slip op. at 2 (S.D. Ill. Oct. 14, 1982) (ruling that anonymity of source does not negate confidentiality).

⁹⁹ See Spannaus, No. 92-0372, slip op. at 15 (D.D.C. June 20, 1995) (determining that "plaintiff asserting a claim of prior disclosure must designate specific information in the public domain that duplicates what is being withheld"); Kirk v. United States Dep't of Justice, 704 F. Supp. 288, 293 (D.D.C. 1989); see also L&C Marine Transp., 740 F.2d at 925.

¹⁰⁰ See Irons, 880 F.2d at 1450-51.

¹⁰¹ See id. at 1449; see also, e.g., Ortiz, 70 F.3d at 732 (reiterating that "Exemption 7(D) is meant to . . . encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential" (quoting United Techs., 777 F.2d at 94)); Kennedy, 1994 U.S. Dist. LEXIS 2275, at **14-15 (stating that release of information would "jeopardize [agency's] ability to conduct future law enforcement operations premised upon promises of confidentiality"); Duffin, 636 F.2d at 712-13 (reiterating Congress' belief that

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however, courts need look no further than the Act's literal language to see that all source-provided information is covered in criminal and national security investigations.¹⁰²

Once courts determine the existence of confidentiality under Exemption 7(D), they are reluctant to find a subsequent waiver of the exemption's protections. This restraint stems both from the potentially adverse repercussions that may result from additional disclosures and from a recognition that any "judicial effort[] to create a `waiver' exception" to exemption 7(D)'s language runs afoul of the statute's intent to provide "workable rules."¹⁰³ It therefore has been observed that a waiver of Exemption 7(D)'s protections should be recognized only upon "absolutely solid evidence showing that the source of an FBI interview in a law enforcement investigation has manifested complete disregard for confidentiality."¹⁰⁴

Thus, even authorized or official disclosure of some information provided by a confidential source in no way opens the door to disclosure of any of the other information the source has provided.¹⁰⁵ In this vein, it is now well es

¹⁰¹(...continued)

disclosure of confidential information would discourage cooperation from sources); Biase, No. 93-2521, slip op. at 11 n.14 (D.N.J. Dec. 10, 1993) (stating that the "goal of Exemption 7(D) [is] to protect the ability of law enforcement agencies to obtain the cooperation of persons having relevant information"); Church of Scientology, 816 F. Supp. at 1161 (explaining that Exemption 7(D) was enacted "to ensure that the FOIA did not impair federal law enforcement agencies' ability to gather information"); Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, slip op. at 13 (S.D. Ohio Feb. 9, 1993) (noting that "purpose of Exemption 7(D) is to ensure that the FOIA did not impair the ability of federal law enforcement agencies to gather information, thus to ensure that information continued to flow to those agencies"); Shafmaster Fishing, 814 F. Supp. at 185 (stating that object of Exemption 7(D) "not simply to protect the source, but also to protect the flow of information to the law enforcement agency" (citing Irons, 880 F.2d at 1449, 1453)).

¹⁰² See, e.g., Irons, 880 F.2d at 1448.

¹⁰³ Parker, 934 F.2d at 380; see Irons, 880 F.2d at 1455-56 (citing Reporters Comm., 489 U.S. at 779).

¹⁰⁴ Parker, 934 F.2d at 378 (quoting Dow Jones & Co. v. Department of Justice, 908 F.2d 1006, 1011 (D.C. Cir.), superseded, 917 F.2d 571 (D.C. Cir. 1990)).

¹⁰⁵ See Shaw, 749 F.2d at 62 (holding that "[d]isclosure of one piece of information received from a particular party--and even the disclosure of that party as its source--does not prevent that party from being a `confidential source' for other purposes"); Brant Constr., 778 F.2d at 1265 n.8 (ruling that "subsequent disclosure of the information, either partially or completely, does not affect its

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established that source-provided information remains protected even when some of it has been the subject of testimony in open court.¹⁰⁶ Moreover, in order to demonstrate a waiver by disclosure through authorized channels, the requester must demonstrate both that "the exact information given to the [law enforcement authority] has already become public, and the fact that the informant gave the

¹⁰⁵(...continued)

exempt status under 7(D)"); Johnson v. Department of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) (stating that fact that someone made public statement concerning incident "does not constitute a waiver of the Bureau's confidential file"; press account may be erroneous, false, or "more likely," incomplete).

¹⁰⁶ See, e.g., Jones, 41 F.3d at 249 (holding that Exemption 7(D) "provides for nondisclosure of all sources who provided information with an understanding of confidentiality, not for protection of only those sources whose identity remains a secret at the time of future FOIA litigation [because they do not testify]"); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (concluding that informant's testimony in open court did not "waive the [government's] right to invoke Exemption 7(D)" (quoting Parker, 934 F.2d at 379-80)); Ferguson, 957 F.2d at 1068 (affirming that local law enforcement officer does not lose status as confidential source by testifying in court); Parker, 934 F.2d at 379-81 (stating that "government agency is not required to disclose the identity of a confidential source or information conveyed to the agency in confidence in a criminal investigation notwithstanding the possibility that the informant may have testified at a public trial"); Irons, 880 F.2d at 1454 (recognizing that "[t]here is no reason grounded in fairness for requiring a source who disclosed information during testimony to reveal, against his will (or to have the FBI reveal for him), information that he did not disclose in public"); Kimberlin, 774 F.2d at 209 (determining that "disclosure [prior to or at trial] of information given in confidence does not render non-confidential any of the information originally provided"); Scherer v. Kelley, 584 F.2d 170, 176 n.7 (7th Cir. 1978); Reiter, 1997 WL 470108, at *7 (finding continued protection for "publicly identified" informants and information supplied by informants); Foster v. United States Dep't of Justice, 933 F. Supp. 687, 693 (E.D. Mich. 1996) (finding Exemption 7(D) "not waived even if the source has testified in court or the information provided by the source has otherwise been made public"); Guerrero, No. 93-2006, slip op. at 10 (D. Ariz. Feb. 21, 1996) (ruling that "full disclosure of information provided by a confidential informant is not required simply because the confidential source testified in court"); Plazas-Martinez, 891 F. Supp. at 4 (explaining that Exemption 7(D) applies to information given by informant who was confidential "even if the informant later testifies at trial"); Crooker, 1995 U.S. Dist. LEXIS 7031, at *15 (holding that "even if a confidential source testifies in court against the requester" source does not lose his confidentiality); Wickline, No. 92-1189, slip op. at 10 n.8 (D.D.C. Sept. 30, 1994) (clarifying that confidentiality not waived when source testified in public trial; "FBI simply must disclose the 'exact information' about which the source testified"); Proctor, No. 88-3340, slip op. at 1 (D.D.C. Aug. 8, 1994) (withholding proper when "individuals . . . testified or were listed as possible witnesses"); Johnson, 1990 U.S. Dist. LEXIS 18358, at *8-9 (rejecting waiver notwithstanding fact that individuals were called as plaintiff's witnesses at prison disciplinary hearing and testified in plaintiff's presence).

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same information to the [law enforcement authority] is also public."¹⁰⁷ Consequently, one court has found that the government is not required even to "confirm or deny that persons who testify at trial are also confidential informants."¹⁰⁸

The lengths to which it is proper to go when necessary to safeguard informant identification through informant-provided information are illustrated by one decision holding that letters shown to a suspect for the purpose of prompting a confession were properly denied to the suspect under the FOIA--even though the suspect was the very author of the letters which, in turn, had been provided to authorities by a third party.¹⁰⁹ Similarly, the release of informant-related material to a party aligned with an agency in an administrative proceeding in no way diminishes the government's ability to invoke Exemption 7(D) in response to a subsequent request by a nonallied party.¹¹⁰ Logically, this principle should be extended to encompass parties aligned with the government in actual litigation as well.

Nor is the protection of Exemption 7(D) forfeited by "court-ordered and court-supervised" disclosure to an opponent in civil discovery.¹¹¹ Although it had previously been held that when the government fails to object in any way to such discovery and then consciously and deliberately puts confidential source information into the public record a waiver of the exemption will be found to have occurred,¹¹² more recent Exemption 7(D) decisions have undermined such a conclusion.¹¹³ However, "if the exact information given to the [law enforcement

¹⁰⁷ Parker, 934 F.2d at 378; Dow Jones, 917 F.2d at 577; see also Davis, 968 F.2d at 1280 (holding that government entitled to withhold tapes obtained through informant's assistance "unless it is specifically shown that those tapes, or portions of them, were played during the informant's testimony"); cf. Hale v. United States Dep't of Justice, No. 89-1175, slip op. at 6 (W.D. Okla. Jan. 17, 1995) (stating that "individuals who testified in court could not be expected to have their identities or the topic of their testimony withheld"), rev'd in part on other grounds, 99 F.3d 1025 (10th Cir. 1996).

¹⁰⁸ Schmerler, 900 F.2d at 339 (reasoning that testimony by source does not automatically waive confidentiality because source may be able "to camouflage his true role notwithstanding his court appearance" (quoting Irons, 811 F.2d at 687)); see also Parker, 934 F.2d at 381.

¹⁰⁹ See Gula, 699 F. Supp. at 960.

¹¹⁰ See United Techs., 777 F.2d at 95-96; see also FOIA Update, Spring 1983, at 6.

¹¹¹ Donohue v. United States Dep't of Justice, No. 84-3451, 1987 U.S. Dist. LEXIS 15185, at *14 (D.D.C. Dec. 23, 1987).

¹¹² See Nishnic v. United States Dep't of Justice, 671 F. Supp. 776, 812 (D.D.C. 1987).

¹¹³ See Glick v. Department of Justice, No. 89-3279, 1991 WL 118263, at *4 (continued...)

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agency] has already become public, and the fact that the informant gave the same information to the [agency] is also public, there would be no

¹¹³(...continued)
(D.D.C. June 20, 1991); see also Parker, 934 F.2d at 380 (opining that judicial efforts to create "waiver" exception run contrary to statute's intent to provide workable rules).